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89-383

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

LARRY RAY HANSON,
Petitioner,

vs.

PETER N. ARROWSMITH, M.D.; PETER N. ARROWSMITH, M.D., P.C.; AND ARROWSMITH EYE INSTITUTE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the district court's failure to dismiss alternate jurors before deliberations as required by Fed. R. Civ. P. 47(b) constitutes reversible error?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is published at 872 F.2d 745. It is printed in Appendix A hereto at page A1.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 14, 1989. A timely petition for rehearing was denied on June 6, 1989. This petition has been filed within ninety days of that date. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2072, the statute authorizing the promulgation of the Federal Rules of Civil Procedure, provides in pertinent part: "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

RULES INVOLVED

Fed. R. Civ. P. 47(b), adopted pursuant to 28 U.S.C. § 2072, states in pertinent part:

> Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. *An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.*

(Emphasis added).

Rule 12(j) of the Local Rules of Court for the Middle District of Tennessee provides that "[a]ll civil juries shall be composed of six (6) persons, *excluding alternates.*" (Emphasis added).

STATEMENT OF THE CASE

Petitioner Larry Ray Hanson filed this medical malpractice action in the United States District Court for the Middle District of Tennessee against Parkside Surgery Center ("Parkside") and Dr. Peter N. Arrowsmith and his professional organizations ("Dr. Arrowsmith").[1] Jurisdiction was based on diversity. 28 U.S.C. § 1332 (a)(1). Mr. Hanson sought damages for the complete loss of vision suffered in his left eye as a result of the negligence of respondents and as a result of their failure to obtain his informed consent for the surgery.

The case was tried to a jury with Judge John T. Nixon presiding. Prior to trial, counsel had an informal discussion with the judge in chambers concerning, among other things, jury selection. The discussion is not in the transcript of the trial because neither the parties nor the court requested the court reporter to be present. The parties strenuously disagree about what occurred during this in-chambers conference.

At trial, a panel of twenty prospective jurors was sworn. Each side was allowed to exercise six peremptory challenges so that eight jurors remained. The parties understood that the jury consisted of six regular jurors and two alternates. Alternates were not specifically designated. There is a dispute among the parties about the planned method of selection and dismissal of the alternates.

At the end of the trial, the judge directed all eight jurors to retire and deliberate in order to reach a verdict. Mr. Hanson's counsel objected and requested that

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1. Mr. Hanson's wife, Linda Hanson, was originally a plaintiff in this action, but her case was voluntarily dismissed at trial. Parkside Surgery Center was originally a defendant, but settled with Petitioner during the pendency of his appeal to the Sixth Circuit.

two jurors be struck as alternates. The judge then asked Dr. Arrowsmith's counsel whether he wanted to strike to a six member jury or to allow the case to be submitted to all eight. Dr. Arrowsmith's counsel responded that he would prefer to let all eight deliberate. Mr. Hanson's counsel again objected and requested an opportunity to strike to a six-member jury as was his understanding of the procedure set out by the court and as required by Fed. R. Civ. P. 47(b) and the local rules of the Court. The court rejected these requests, stating: "It's up to the Court. I am going to let it go to all eight." The eight-member jury then returned a verdict in favor of the defendants and judgment was entered on January 22, 1986.

Petitioner filed a motion for new trial, alleging, *inter alia*, that the trial court's refusal to dismiss two alternates and its submission of the case to eight jurors constituted reversible error. The court denied the motion. On October 8, 1986, within thirty days of that denial, Petitioner filed a Notice of Appeal to the Sixth Circuit.

On January 23, 1987, more than a year after the trial and three and one-half months after Petitioner had begun the appeal, Dr. Arrowsmith moved the district court for approval of a statement on the evidence or proceedings and for correction of the record, pursuant to Fed. R. App. P. 10. Dr. Arrowsmith sought the district court's approval of his counsel's narrative of the unreported pre-trial meeting held in chambers. Dr. Arrowsmith supported his Motion with affidavits of his attorneys. According to Dr. Arrowsmith's counsel, no one objected when in the in-chambers session, the judge stated that the parties would be allowed a peremptory challenge at the end of the trial to eliminate the alternate jurors *only if* all parties agreed.

Petitioner objected to Dr. Arrowsmith's Motion on the grounds (1) that the Motion was time barred pursuant to Fed. R. App. P. 10(b); (2) that the purpose of Fed. R. App. P. 10 is to allow parties to create a record only if they could not have obtained a transcript at the time, not to create a transcript when the parties waived their right to have a transcript; and (3) that the statements of the proceedings by Dr. Arrowsmith's counsel were inaccurate. Petitioner's objection was supported by the affidavits of his trial attorneys. Their recollection of the in-chambers conference differed significantly from the recollection of Dr. Arrowsmith's counsel. They understood that the jury was to be composed of six jurors and two alternates and that each party would exercise a peremptory challenge at the conclusion of proof so that only six jurors would deliberate. They denied that there was any discussion or understanding of allowing an eight-member jury to deliberate under any circumstances.

Despite a request for a hearing, on February 23, 1987, the trial court granted Dr. Arrowsmith's motion without a hearing and approved his counsel's statement verbatim. Petitioner objected to its inclusion in the record on appeal, and the appeal proceeded.

The Sixth Circuit affirmed the judgment. On the jury issue, the Court did not rest its decision on the issue of whether the district court's failure to dismiss the alternates violated Fed. R. Civ. P. 47(b) and the local rule, nor upon the issue of whether the court's action violated Petitioner's Seventh Amendment right to a trial by jury. Rather, the Court held that even if the district court's ruling violated these rights, that violation should be judged by the harmless error stan-

dard. Applying that standard, the Sixth Circuit found that Mr. Hanson had not been prejudiced by the action of the district court.

REASONS FOR GRANTING WRIT

This Court should grant a writ of certiorari to review the Sixth Circuit's decision because it conflicts with the decision of another federal court of appeals and involves an important federal question upon which this Court has not yet had the opportunity to rule. *See* Sup. Ct. R. 17.1. The decision directly conflicts with the Fourth Circuit's holding in *Kuykendall v. Southern Railway Co.*, 652 F.2d 391 (4th Cir. 1981). Further, it conflicts with numerous cases addressing jury selection and deliberation. Moreover, the Sixth Circuit's decision sanctions a jury selection process by district courts that violates Rule 47(b), creates uncertainty for all parties in terms of compositions of the jury, and weakens the Seventh Amendment right to a jury trial.

The Seventh Amendment and the statutes authorizing the rules of civil procedure mandate the preservation of the right of jury trial as at common law. The Federal Rules of Civil Procedure preserve that right by permitting a party to demand a jury (Rule 39), by providing a method for their examination (Rule 47(a)), by regulating the number of jurors (Rule 48) and by providing for the selection and dismissal of alternates (Rule 47(b)). Both at common law and according to the dictates of Rule 47(b), a jury is by definition not composed of alternates. To disregard the requirements of Rule 47(b) and to allow alternates to deliberate violates the sanctity of the jury process. Moreover, the sanctioning by the Sixth Circuit of procedures by district courts which de-

viate from the rules of civil procedure without express agreement of the parties threatens the right to a jury by making it subject to uncertainty and ad hoc decision-making.

The integrity of the jury process, the sanctity of the jury's proceedings, and the dynamics of its functioning are substantive parts of the constitutionally protected common law right to a trial by jury. *See, e.g., Remmer v. United States,* 350 U.S. 377, 382 (1956) ("[I]t is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made."); *United States v. Virginia Erection Corp.,* 335 F.2d 868, 872 (4th Cir. 1964) (emphasis added) ("[T]he presence of the alternate in the jury room violated the *cardinal principle* that the deliberations of the jury shall remain private and secret in every case."); *People v. Bruneman,* 4 Cal. App. 2d 75, 40-P.2d 891, 893 (1935), *quoting Goby v. Wetherill,* 2 King's Bench Div. 674 ("The principle is that the jury are entitled, and bound, to deliberate in private. If a stranger, whether an officer of the court, or not, is present for a substantial time during their deliberations, then the verdict is vitiated."); *Patten v. State,* 221 Tenn. 337, 344, 426 S.W.2d 503, 506-507 (1967), *cert. denied,* 400 U.S. 844 (1970) (holding that allowance of alternate in jury room violates traditional principles of common law right to trial by jury); *State v. Cuzick,* 85 Wash. 2d 146, 530 P.2d 288, 289 (1975) ("[T]here can be no question that [the jury] must reach its decision in private, free from outside influence. This principle is of constitutional stature.")

In *Kuykendall v. Southern Railway Co.,* 652 F.2d 391 (4th Cir. 1981), a case in essence identical to the instant

case, the Fourth Circuit held that submission of a civil case to a jury of more than six persons in the absence of a *written or clearly recorded stipulation* was *per se* error and mandated reversal and remand for a new trial. Just as in the instant case, in *Kuykendall,* the court empanelled a jury of eight without designating which two of the eight would be alternate jurors. After closing arguments, the trial court announced, out of the presence of the jury, that the case would be submitted to all eight jurors for deliberations. *Id.* at 392. Defendant's counsel objected and requested that each side be allowed an additional strike. The trial court overruled defendant's objection and submitted the case to seven jurors.[2] In reversing the trial court, the Fourth Circuit reasoned that because there was no "written" or "clearly recorded" stipulation, the jury *must be treated* as one of six regular jurors and two alternates. Therefore, under Fed. R. Civ. P. 47(b) providing that alternate jurors *shall be dismissed before the jury retires to consider its verdict,* the trial court should have dismissed two jurors. The Fourth Circuit held that the trial court's failure to do so constituted reversible error. *Id.* at 392-393; *see also DeBenedetto v. Goodyear Tire & Rubber Co.,* 754 F.2d 512 (4th Cir. 1985) (holding that silence by plaintiff's counsel to the court's statement (appearing on the record) that all eight jurors would participate in deliberation at the close of the case amounted to a clearly recorded stipulation within the meaning of *Kuykendall* and would not support a reversal of the jury's verdict.); *Seese v. Volkswagenwerk, A.G.,* 648 F.2d 833 (3rd Cir.), *cert. denied,* 454 U.S. 867 (1981) (noting

2. One juror fell ill, reducing the number of jurors from eight to seven.

that when all parties *consent*, courts have allowed alternate jurors to deliberate).

In so holding, *Kuykendall* relied upon numerous previous cases holding that allowing alternates to deliberate in a criminal trial destroyed the sanctity of the jury process and constituted *per se* error:

> In any event, the presence of the alternate in the jury room violated the cardinal principle that the deliberations of the jury shall remain private and secret in every case. The presence of any person other than the jurors to whom the case has been submitted for decision impinges upon that privacy and secrecy. It is possible that [the alternate's] presence may have operated to some extent as a restraint upon the jurors and their freedom of action and expression.

United States v. Virginia Erection Corp., 335 F.2d 868, 872 (4th Cir. 1964); *see also United States v. Chatman*, 584 F.2d 1358, 1361 (4th Cir. 1978) ("we must notice the presence of the alternate in the jury room during part of the jury's deliberations as plain error, reverse the convictions and award defendant a new trial."); *Eickmeyer v. Dunkin Donuts of America, Inc.*, 507 So. 2d 1193, 1194 (Fla. App. 1987) ("It is well-settled in Florida that fundamental, reversible error occurs wherever, as here, an alternate juror—who is considered as any other unauthorized person—is so much as present during the deliberations even though, *un*like the present case, he remains silent and contributes nothing to the result.")

Significantly, the Tennessee Supreme Court has similarly held that allowing alternates to deliberate, as the court in the present case did, constitutes immediate and reversible error:

> While it is now possible to waive a jury trial or to waive the number of jurors, no provision exists which allows additional persons within the confines of the jury deliberation. In this case it would have been possible for this additional juror to have influenced the other members of the jury without his ever being required to face the moment of truth by casting a vote. To allow the additional juror to be present in the jury room during deliberations is contrary to the common law, the principles embedded in the concept of the jury trial, and the applicable statutory provision, sec. 22-222 [state statutory provision requiring that alternates be discharged prior to submission of a case to a jury].

Patten v. State, 221 Tenn. 337, 344, 426 S.W.2d 503, 506-507 (1967), *cert. denied,* 400 U.S. 844 (1970).

The Sixth Circuit rejected *Kuykendall* and, consequently, all of these other opinions, without giving any reason for doing so. Rather, relying upon several decisions of this Court concerning the constitutionally permissible *minimum* number of jurors, it asserted that the submission of Mr. Hanson's case to a jury composed of six jurors and two alternates could not have prejudiced him (presumably under the theory that eight jurors is better than six) and, therefore, did not constitute reversible error. *See Hanson,* Appendix A, *relying upon Colgrove v. Battin,* 413 U.S. 149 (1973) (involving challenge to a local rule requiring six-person juries in all civil cases); *Ballew v. Georgia,* 435 U.S. 223 (1978) (involving challenge to state statute requiring five-person juries in criminal misdemeanor cases). In so asserting, however, the court missed the point.

The Supreme Court cases upon which it relied concern whether the right to a jury trial is denied by submission of a case to a jury of six members *or less*. The issue here is whether Mr. Hanson's right to a jury trial is infringed when an essential and substantive element of that right, the integrity of the jury proceedings, is jeopardized by the unauthorized participation of alternates in deliberations, despite his timely objections, and by the court's deviation from set rules of civil procedure without clear agreement by the parties. This is an entirely different question.

Further, as the Tenth Circuit has recognized in the criminal context, a prejudice requirement such as that the Sixth Circuit applied in this case is utterly inappropriate and unworkable:

> In these circumstances it is difficult to see how a test of 'prejudice' can be applied. The alternate was fully qualified to participate as were the others, she had been instructed with the others, and her participation can hardly be considered 'prejudicial.' Perhaps an attempt could be made to show the juror attempted to influence others by expressing an opinion or conclusion, but again this is not related to 'prejudice.' *The borrowing of a 'prejudice' standard from other constitutional situations does not seem to provide an appropriate standard or test.*
>
> *Once the prescribed number of jurors becomes 'the jury,' then, and immediately, any other persons are strangers to its proceedings. Their presence destroys the sanctity of the jury and a mistrial is necessary.*

United States v. Beasley, 464 F.2d 468, 470 (10th Cir. 1972) (emphasis added). A party will certainly never

be able to demonstrate prejudice so long as courts assume, as the Sixth Circuit did, that having more than six jurors is always better than having six jurors.[3]

Moreover, the Sixth Circuit's opinion sanctions uncertainty and ad hoc decision-making by district courts in regard to jury selection. As this Court has previously recognized, there is a need for clear delineation and certainty as to rules regarding jury composition and selection:

> Though the line separating the permissible jury practice from the impermissible may not be the brightest, a line must be drawn somewhere, and the constitutional inviolability of that border must be scrupulously respected lest the purpose and functioning of the jury be seriously impaired.

Brown v. Louisiana, 447 U.S. 323, 331 (1980) (citations omitted). Allowing a district court to deviate from the federal rules pertaining to juries without a clearly recorded stipulation violates these principles of clarity and certainty.

In subjecting a violation of Rule 47(b) to the harmless error standard, the Sixth Circuit ignored the importance of the issue with which Rule 47(b) and Local Rule 12(j) are concerned—the Seventh Amendment right to a jury. That right is an essential element of the broader right to a fair trial. Both the appearance and reality of fairness will be destroyed if trial judges can ignore these and similar rules regarding jury composi-

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3. In any event, Mr. Hanson submits that he was prejudiced. The jury that deliberated and decided his case contained two persons who, according to the rules, should not have been in the jury room. He therefore faced a burden of convincing eight, not six, people.

tion. A litigant will not know whether his case will be decided by six, eight, twelve or fourteen jurors until the judge decides at the conclusion of the proof.

The only way to prevent this uncertainty and the consequent infringement of a party's right to a trial by jury is to adopt the *Kuykendall* rule. Under that rule, only a written or clearly recorded stipulation (not an after-the-fact reconstruction of a disputed, off-the-record conversation between the parties) will allow the district court to deviate from Rule 47(b). In the absence of such, when a district court fails to follow that rule the resulting judgment must be reversed without applying an artificial and unworkable prejudice standard.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the question discussed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Steven A. Riley, a member of the Bar of the Supreme Court of the United States and counsel of record for Larry Ray, petitioner herein, hereby certify that on this the 31st day of September, 1989, the requisite number of copies of the foregoing were served upon Noel F. Stahl, CORNELIUS & COLLINS, 29th Floor, Third National Financial Center, Post Office Box 2808, Nashville, Tennessee 37219, attorneys for respondents, by United States mail, postage prepaid.

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APPENDIX

APPENDIX A

No. 86-6089

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LARRY RAY & LINDA HANSON,
Plaintiffs-Appellants,

v.

PARKSIDE SURGERY CENTER; PETER N. ARROWSMITH, M.D.; PETER N. ARROWSMITH, M.D., P.C.; and ARROWSMITH EYE INSTITUTE,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Tennessee

Decided and Filed April 14, 1989

Before: ENGEL, Chief Judge;* MERRITT and NORRIS, Circuit Judges.

ENGEL, Chief Judge. Plaintiff Larry Ray Hanson appeals from the judgment of the United States District Court for the Middle District of Tennessee granting defendant Parkside Surgery Center's motion for a directed verdict and from a jury verdict rendered in favor of defendant Peter N. Arrowsmith, M.D. and the remaining defendants. After this appeal was filed, Parkside Sur-

*The Honorable Albert J. Engel assumed the duties of Chief Judge April 1, 1988.

gery settled with Hanson and was dismissed from the case. Hanson's claims with regard to the other defendants remain before us.

Hanson asserts that the district court committed six reversible errors in conducting the trial: (1) seating an eight-member jury, with all eight members deliberating; (2) restricting the testimony of plaintiff's expert, Dr. Denis O'Day; (3) excluding the deposition testimony of Dr. John M. Omahundro, III; (4) disallowing evidence of Dr. Arrowsmith's revised informed consent form; (5) failing to allow plaintiff's counsel to cross-examine Dr. Arrowsmith concerning statements attributed to him contained in a newspaper article; and (6) failing to allow plaintiff's counsel to admit into evidence the informed consent form used by plaintiff's expert.

The most important issue raised by plaintiff, in our judgment, is whether it was reversible error under the circumstances here for the trial court to have submitted the case to the unanimous decision of eight, as contrasted to six, jurors. After reviewing the briefs and record and hearing oral argument, and despite reservations about the manner in which the jury was seated, we reject all of Hanson's claims of error and affirm.

In 1983, Larry Hanson, a resident of Alabama, learned of an experimental/investigative eye surgery called radial keratotomy which reduces nearsightedness by changing the shape of the cornea. The procedure has been done by Dr. Arrowsmith in Nashville, Tennessee since 1981. Mr. Hanson visited Arrowsmith's office in Nashville, spoke with Arrowsmith concerning the procedure, and watched a video tape prepared by Arrowsmith as part of the informed consent process. Mr. Hanson elected

to have the surgery and signed Dr. Arrowsmith's and Parkside Surgery's informed consent forms, but during the anesthesia process (the anesthesia was administered with a sharp-tipped rather than a blunt-tipped needle, a medical decision, the validity of which is also in dispute), Hanson's optic nerve was damaged and he was rendered blind in his left eye.

The Hansons timely filed a medical malpractice suit invoking the diversity jurisdiction of the United States District Court for the Middle District of Tennessee alleging negligence in the anesthesia process. They further alleged that defendants had failed to obtain Hanson's informed consent. The case was tried before a jury, and Tennessee's malpractice statutes were applied. During trial and before the jury began its deliberations, plaintiff Linda Hanson dismissed her claims. A directed verdict subsequently was rendered for Parkside, and the jury returned a verdict for defendant Arrowsmith. Larry Hanson filed a motion for new trial pursuant to Fed. R. Civ. P. 59(a). His motion was denied. Shortly thereafter, he filed a motion for reconsideration of that order. While that motion was pending, he also filed a notice of appeal. Following a change in counsel, Hanson filed a motion to stay all proceedings pending a determination of the effectiveness of the notice of appeal or, in the alternative to file a supplemental brief. The trial court decided that it would not rule on the plaintiff's motion to reconsider pending the outcome of the issue in this court.

On January 23, 1987, pursuant to Fed. R. App. P. 10, defendant Arrowsmith filed a motion in the district court for approval of a statement on the evidence or proceedings and for correction of the record with regard to the

contents of an unreported pre-trial meeting held in chambers during which the manner of selection and the size of the jury was discussed. Over plaintiff's motion in opposition, the district court granted Arrowsmith's motion and approved his statement on the evidence or proceedings. The statement set out the jury selection process as it was described by the district court to all counsel at the pre-trial conference:

> twenty jurors would be brought to the courtroom and placed in the jury box and in a row of seats in front of the box. During voir dire plaintiffs would be allowed six peremptory challenges and the defendants would be allowed six peremptory challenges between them. After all twelve challenges had been exercised a jury of eight persons would be sworn and seated and no alternate jurors would be specifically designated. The case would then be tried to all eight jurors. At the end of the trial if both sides agreed to excuse two of the jurors then each side would select one juror who would be dismissed and the remaining jury of six persons would retire to deliberate. If both sides did not agree to excuse two jurors at the end of the trial, then the case would be submitted to a jury of eight.[1]

The statement also indicated that all counsel had an opportunity to ask the district court questions about the procedure and that they expressed their understanding

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1. Since no jurors were excused we need not decide whether permitting additional strikes after each side has presented its case and observed the reaction of individual jurors would be appropriate even by stipulation. However, it has been suggested that the practice appears to be "subversive of the truth-seeking purpose of the jury process." *Kuykendall v. Southern Railway*, 652 F.2d 391, 392 (4th Cir. 1981). No claim is made that any juror was subject to challenge for cause.

of and agreement "with the manner of jury selection and the number of jurors who would hear the case."[2] The plaintiff continues to challenge the propriety of the district court's decision to approve the statement and to question its accuracy.

Plaintiff first claims that the district court committed reversible error by submitting the case for deliberation, over plaintiff's objection, to an eight-member jury in violation of Fed. R. Civ. P. 47(b) and Rule 12(j) of the Local Rules of the Court for the Middle District of Tennessee. In relevant part, Rule 47(b) provides "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." Local Rule 12(j) provides "[a]ll civil juries shall be composed of six (6) persons, excluding alternates." Relying primarily on *Kuykendall v. Southern Railway, supra*, plaintiff argues that both of these rules are "mandatory," and therefore absent a valid stipulation by the parties, as provided for in Fed. R. Civ. P. 48, for an eight-member jury, the district court's failure to discharge two jurors as alternates in this case is grounds for reversal.[3] *See also DeBenedetto v. Goodyear Tire*

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2. No express reason is given for this agreement, nor is any potential or actual prejudice suggested. The most logical explanation is that it simply made no difference to the parties. When jurors have sat together in hearing a case they often develop friendships and a natural desire to see it through to the end. Consequently jurors who are excused before the rest retire are often disappointed, and even frustrated by a feeling that their participation turned out to be useless in the end. Counsel, sensing this, may be reluctant to risk the displeasure of the jury by suggesting a reduction in the size, especially when there is no perceived advantage to their clients in doing so.

3. Fed. R. Civ. P. 48 provides:

> The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as a verdict or finding of the jury.

& *Rubber Co.*, 754 F.2d 512 (4th Cir. 1985). Defendants counter by arguing that because no substantial right was affected, the claimed violations of Rule 47(b) and Local Rule 12(j) in this case do not merit a new trial, and moreover, because plaintiff agreed to the procedure followed at trial, albeit during a conference that took place off the record, he waived the right to object to any violation of either of the rules. We conclude that Fed. R. Civ. P. 48 does not preclude a stipulation such as that found by the district court.[4] Likewise we find that the local rule does not preclude waiver by a stipulation entered into pursuant to Rule 48.

In *Kuykendall v. Southern Railway, supra,* as in this case, the trial court empaneled an eight-member jury without designating two members as alternates. After closing arguments, the court announced, out of the presence of the jury, that the case would be submitted to the eight jurors, all of whom would participate in the deliberations. The defendants objected, relying on a local rule requiring the trial judge to submit the case to a jury of either six or twelve, but the objection was overruled. Because one of the eight jurors was excused for illness, the case was eventually submitted to the remaining seven. Borrowing from its cases addressing similar situations under Fed. R. Crim. P. 24(c), the analogous rule of criminal procedure, the court of appeals

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4. In reaching this decision we reject plaintiff's overly restrictive reading of Fed. R. App. P. 10 and find the district court's statement on the evidence or proceedings is properly before us pursuant to Fed. R. App. P. 10(e). *Cf. Cox v. General Electric Co.*, 302 F.2d 389 (6th Cir. 1962) (applying predecessor to Rule 10(e)); *S & E Shipping Corp. v. Chesapeake & Ohio Railway*, 678 F.2d 636 (6th Cir. 1982); *United States v. Page*, 661 F.2d 1080 (5th Cir. 1981). *See generally* 9 Moore, Ward & Lucas, *Moore's Federal Practice* ¶¶ 210.06[3], 210.08 (2d ed. 1988).

adopted a "per se rule of reversal" for civil cases where an alternate juror is allowed to retire with the jury in violation of Rule 47(b). It therefore reversed and remanded the case for a new trial. *Id.* at 393. Although no alternates had been designated, the Fourth Circuit reasoned that since there was no "written" or "clearly recorded" stipulation pursuant to Rule 48 the jury must be treated as one of six regular jurors and two alternates. *Id.* at 392-93. The effect of this designation was to bring the jury within the mandate of Rule 47(b).

While the Fourth Circuit was within its superintending authority in holding that a departure from the authorized jury size in civil cases is permitted only "by a written stipulation or one clearly recorded," *DeBenedetto,* 754 F.2d at 514; *Kuykendall,* 652 F.2d at 392, we decline to adopt such a per se rule here. Moreover, assuming that Rule 47(b) and that Local Rule 12(j) may have been violated, we still believe such violations are subject to the application of the harmless error standards of Fed. R. Civ. P. 61. *Cf. United States v. Levesque,* 681 F.2d 75, 80 (1st Cir. 1982) (violation of Fed. R. Crim. P. 24 warrants reversal only where irregularity affects substantial rights).

The Supreme Court has noted that, for purposes of the seventh amendment, what is required for a jury is "a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross-section of the community." *Colgrove v. Battin,* 413 U.S. 149, 160 n.16 (1973). In *Colgrove,* the Court rejected a seventh amendment challenge to a local rule of the United States District Court for the District of Montana which provided for trial of all civil cases before a jury of six instead of the traditional twelve. In reach-

ing its decision, the Court relied upon its prior decision in *Williams v. Florida,* 399 U.S. 78 (1970) (upholding, against a sixth and fourteenth amendment challenge, the use of a six-member jury in a state criminal trial), and stated:

> Keeping in mind the purpose of a jury trial in criminal cases to prevent government oppression, . . . and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues, . . . the question comes down to whether jury performance is a function of jury size. In *Williams,* we rejected the notion that "the reliability of the jury as a fact-finder . . . [is] a function of its size," . . . and nothing has been suggested to lead us to alter that conclusion.

413 U.S. at 157 (citations omitted).

Later, in *Ballew v. Georgia,* 435 U.S. 223 (1978), Justice Blackmun, joined by Justice Stevens, commented upon a series of studies considering the efficacy of juries composed of fewer than twelve jurors and observed:

> the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members. We readily admit that we do not pretend to discern a clear line between six members and five. But the assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six. Because of the fundamental importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decision-making, that causes untoward differences in verdicts,

> and that prevents juries from truly representing their communities, attains constitutional significance.

Id. at 239. For differing reasons, the remaining seven justices concurred in Justice Blackmun's conclusion that a five person jury in a criminal trial does not satisfy the jury trial guarantees of the sixth and fourteenth amendments. *Id.* at 245-46.

Ballew, of course involved a criminal trial. However, results of the studies reviewed therein suggest at least that a civil jury composed of fewer than six members may also run afoul of the seventh amendment requirements set out in *Colgrove,* but we need not resolve that question here. On the contrary, the studies cited by Justice Blackmun in *Ballew* suggest, if anything, *increased* reliability where juries, such as the one involved in this case, consist of more than six jurors. *See Ballew,* 435 U.S. at 232-239. Since plaintiff makes no claim that the jury was wrongfully influenced in any way during its deliberations or that the two "extra" jurors were incompetent or unqualified, we must conclude that no right was violated and therefore that no reversible error occurred despite the departure from authorized jury size.

We also find that none of plaintiff's five other claims of error merits a new trial.

Plaintiff argues that the district court erred by restricting his expert witness' testimony on the issue of informed consent. As a result, plaintiff claims, his expert was not permitted to testify that Dr. Arrowsmith's video tape, prepared as part of the informed consent process and viewed by plaintiff, improperly minimized the risks involved in the procedure in order to induce plaintiff's consent. The district court permitted Dr. O'Day

to state what information he believed Dr. Arrowsmith had failed to include in the video tape, but did not permit him to testify concerning his belief that the tape presented the risks involved in the procedure in a "persuasive" manner. Basing its decision, in part, on its understanding of Tennessee law and its belief that Dr. O'Day's area of expertise did not include "communications," the district court concluded that Dr. O'Day's testimony concerning the manner in which the information was presented would not assist the jury, which could see and evaluate the video tape on its own. Since the decision to allow expert testimony, pursuant to Fed. R. Civ. P. 702, is largely within the discretion of the trial court, we will disturb the trial court's ruling only if it is clearly erroneous or an abuse of discretion. *See, e.g., Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 919 (6th Cir. 1984). *See also Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1208 (6th Cir. 1984) (four part test must be met to uphold the admission of expert testimony). Applying these standards we hold that the district court did not abuse its discretion in this case.[5]

Plaintiff next argues that the district court erred in denying his request to admit the deposition testimony of Dr. John M. Omahundro, III, pursuant to Fed. R. Civ. P. 32(a)(3)(D). On the facts of this case, especially in light of evidence that plaintiff's inability to procure

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5. After oral argument was heard in this case, our court addressed but did not decide the question of the relationship of Fed. R. Evid. 601 ("General Rule of Competency") and Fed. R. Evid. 702 ("Testimony by Experts") where a state's statute provides that certain individuals are incompetent to testify as experts. *Ward v. United States*, 838 F.2d 182, 188-89 (6th Cir. 1988) (applying Tennessee malpractice statutes in action under Federal Tort Claims Act). Because neither party has raised the issue of Dr. O'Day's competency as an expert, we again decline to consider that question.

the witness' attendance at trial was at least in part due to plaintiff's own lack of diligence, we do not find that the district court abused its discretion.

Plaintiff also raises the claim that the district court erred in disallowing evidence of Dr. Arrowsmith's revised informed consent form. Dr. Arrowsmith began using the form approximately two years after plaintiff's surgery. We find no error in the district court's ruling pursuant to Fed. R. Evid. 407 because the record simply does not support plaintiff's assertion that, by Dr. Arrowsmith's own admission, the revised consent form is not a subsequent remedial measure. *Cf. Bauman v. Volkswagenwerk A.G.*, 621 F.2d 230, 232-33 (6th Cir. 1980).

Plaintiff next argues that the district court erred in not allowing plaintiff's counsel to cross-examine Dr. Arrowsmith concerning statements attributed to him contained in a newspaper article. We disagree. After reviewing the record in this case we believe the district court acted within its discretion when it excluded this unfairly prejudicial and misleading evidence pursuant to Fed. R. Evid. 403. *Cf. All American Life and Casualty Co. v. Oceanic Trade Alliance Council International Inc.*, 756 F.2d 474, 479 (6th Cir. 1985).

Finally, plaintiff argues that the district court erred by failing to allow plaintiff's counsel to admit into evidence the informed consent form used by plaintiff's expert. The form was prepared by Dr. O'Day to inform patients of the risks involved in a different type of eye surgery. We again find that the district court did not abuse its discretion.

Accordingly, the judgment of the district court is AFFIRMED.

(2)

No. 89-383

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

LARRY RAY HANSON,
Petitioner,

vs.

PETER N. ARROWSMITH, M.D.; PETER N. ARROWSMITH, M.D., P.C.; AND ARROWSMITH EYE INSTITUTE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the district court committed reversible error by submitting this case to an eight person jury when Petitioner consented to an eight person jury prior to trial pursuant to Fed. R. Civ. P. 48 and Petitioner failed to object to an eight person jury when the case was submitted for deliberation?

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STATUTORY PROVISIONS INVOLVED

Petitioner has misquoted the current language of 28 U.S.C. § 2072 (Supp. 1989). The statute now provides as follows:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

The prior version of 28 U.S.C. § 2072, as quoted by Petitioner, was repealed in 1988 and replaced with the above provisions in the Judicial Improvements and Access to Justice Act, Pub. L. 100-702, Title IV, § 401(a), 102 Stat. 4648 (1988).

RULES INVOLVED

Rule 48 of the Federal Rules of Civil Procedure provides as follows:

> **Juries of Less Than Twelve - Majority Verdict.** The parties may stipulate that the jury shall consist of *any* number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

(Emphasis added).

Rule 10(c) of the Federal Rules of Appellate Procedure provides as follows:

> **(c) Statement on the Evidence or Proceedings When No Report Was Made or When the Transcript is Unavailable.** If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

Rule 10(e) of the Federal Rules of Appellate Procedure provides, in pertinent part, as follows:

> **(e) Correction or Modification of the Record.** *If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth.* If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or *the district court either before or after the record is transmitted to the court of appeals,* or the court of appeals, on proper suggestion or of its own initiative, *may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted.*

(Emphasis added).

STATEMENT OF THE CASE

The jury trial in this medical malpractice case began on January 13, 1986, in the United States District Court for the Middle District of Tennessee. On the first morning of trial Judge John Nixon summoned counsel to chambers to discuss and clarify various trial procedures including *voir dire,* challenges of jurors and the numerical composition of the jury. The conference was not transcribed, but the substance of the discussion in chambers was later certified by the trial judge and made a part of the record in accordance with Fed. R. App. P. 10(c) and (e).

The judge and all counsel discussed and agreed upon the jury selection process. Judge Nixon explained that twenty jurors would be brought into the courtroom. The court would allow six peremptory challenges for plaintiffs and six for defendants. After the parties exercised all twelve peremptory challenges, a jury of eight would be sworn and seated with *no designation* of alternate jurors. At the end of trial, *if both sides agreed,* then each side would dismiss one juror, and the remaining jury of six would decide the case. If both sides did not agree to excuse two jurors, then the case would be submitted to the full jury of eight.

All counsel were present during the conference in chambers, and no one objected to the procedure proposed by the trial court. To the contrary, all counsel expressed their understanding of and agreement with the method of jury selection and the number of jurors who would hear the case.

When the trial began, Judge Nixon followed the exact procedure which had been discussed and agreed upon in

chambers. Petitioner's counsel did not object to the trial court seating eight regular jurors with *no* alternate jurors at that time or at any other time during the four day trial.

Following closing arguments and the jury charge, the case was submitted to the eight regular jurors. *After the jury retired and began its deliberations,* Petitioner's counsel asked about reducing the size of the jury. The entire colloquy between court and counsel on this issue (which occurred after the jury retired) was as follows:

> PETITIONER'S COUNSEL: Excuse me, Your Honor, are we not going to strike down to six?
>
> TRIAL JUDGE: You want to strike to six or go to all eight?
>
> RESPONDENTS' COUNSEL: I prefer to let it go to all eight.
>
> PETITIONER'S COUNSEL: I want to strike to six.
>
> TRIAL JUDGE: It's up to the Court. I'm going to let it go to all eight.

Petitioner's counsel never objected. Petitioner's counsel never voiced any complaint that the trial court was deviating from the procedure that had been agreed upon prior to trial. Instead—consistent with the procedure discussed in chambers—Petitioner's counsel merely expressed his desire to strike down to six jurors and then sat mute when, in the absence of an agreement between the parties, the trial judge allowed all eight regular jurors to continue their deliberations.

The eight member jury returned a *unanimous* verdict in favor of Respondents. The trial court entered judgment on the verdict on January 22, 1986.

On February 3, 1986, Petitioner timely filed a motion for new trial which, *inter alia*, contained the conclusory assertion that the trial court erred by submitting the case to an eight person jury. Petitioner filed no brief in support of the motion for new trial and did not indicate why the use of an eight person jury pursuant to agreement might constitute error warranting a new trial. In opposition to the motion for new trial, Respondents filed a memorandum of law that fully recounted the pretrial conference in which all counsel and the trial court had agreed upon the procedure which produced an eight person jury. On September 19, 1986, the trial court denied Petitioner's motion for new trial.

Ten days later Petitioner filed a motion to reconsider the denial of new trial. For the *first* time in the proceedings—almost eight months *after* the original motion for new trial—Petitioner's trial counsel asserted there had been no agreement regarding the procedure which led to an eight person jury. While the motion to reconsider was pending, Petitioner filed a Notice of Appeal on October 8, 1986, thereby divesting the trial court of jurisdiction. The case was docketed in the Sixth Circuit Court of Appeals on October 15, 1986.

Petitioner then discharged his trial counsel, and on November 14, 1986, Steven A. Riley filed a Notice of Appearance as substitute counsel. Petitioner's new counsel also moved the trial court to stay all proceedings even though jurisdiction over the case was vested in the Court of Appeals. Three days later, on November 17, 1986, Petitioner's new counsel sent a letter to the Clerk for the Sixth Circuit Court of Appeals in which he argued against his own client's Notice of Appeal and

further argued that Petitioner's appeal should be dismissed and the case remanded to the trial court. By letter dated December 30, 1986, the Clerk for the Sixth Circuit advised that the Court of Appeals would not rule on Petitioner's challenge to his own Notice of Appeal and that the appeal would proceed as previously scheduled.

On January 23, 1987, Respondents moved the district court, pursuant to Rule 10, Fed. R. App. P., to supplement the record with a narrative statement describing the pretrial conference in which the court and all counsel had agreed upon the jury selection process. After reviewing affidavits from all trial counsel for both Petitioner and Respondents, Judge Nixon supplemented the trial record with the following Statement on the Evidence or Proceedings:

> On the morning of January 13, 1986, all counsel were summoned to chambers where a number of preliminary matters were discussed, including the procedure which would be followed in selecting a jury to try this case. The jury selection process which the court described to all counsel was as follows: twenty jurors would be brought to the courtroom and placed in the jury box and in a row of seats in front of the box. During voir dire, plaintiffs would be allowed six peremptory challenges and the defendants would be allowed six peremptory challenges between them. After all twelve challenges had been exercised *a jury of eight persons would be sworn and seated and no alternate jurors would be specifically designated.* The case would then be tried to all eight jurors. At the end of

> the trial *if both sides agreed* to excuse two of the jurors *then each side would select one juror who would be dismissed* and the remaining jury of six persons would retire to deliberate. *If both sides did not agree* to excuse two jurors at the end of the trial, *then the case would be submitted to a jury of eight.*
>
> All counsel were present when this procedure was described and discussed and no one objected to it. *All counsel* had the opportunity to ask the court questions about the procedure and *expressed their understanding and agreement with the manner of jury selection and the number of jurors who would hear the case.* This procedure was then followed during voir dire, throughout the trial of the case, and when the evidence was concluded and the case submitted to the jury for its consideration.

(Emphasis added). The district court judge expressly certified that the foregoing narrative statement accurately and truthfully set forth the in-chambers discussion of the procedure which produced the eight person jury.

On appeal, the Sixth Circuit rejected Petitioner's assertion that the eight person jury violated Fed. R. Civ. P. 47(b) and Local Rule 12(j). The Sixth Circuit based its decision on Fed. R. Civ. P. 48 and the pretrial *stipulation* of the parties regarding the jury selection procedures.

> We conclude that Fed. R. Civ. P. 48 does not preclude a stipulation such as that found by the dis-

trict court.[4] Likewise, we find that the local rule does not preclude waiver by a stipulation entered into pursuant to Rule 48.

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[4]In reaching this decision we reject plaintiff's overly restrictive reading of Fed. R. App. P. 10 and find the district court's statement on the evidence or proceedings is properly before us pursuant to Fed. R. App. P. 10(e).

Hanson v. Parkside Surgery Center, 872 F.2d 745, 748 (6th Cir. 1989) (citations omitted).

In *dicta* the Sixth Circuit went on to note that even *if* there had been technical violations of Fed. R. Civ. P. 47(b) and Local Rule 12(j), the violations would be reviewed under the harmless error standard. Relying on this Court's opinions in *Ballew v. Georgia,* 435 U.S. 223 (1978), *Colgrove v. Battin,* 413 U.S. 149 (1973), and *Williams v. Florida,* 399 U.S. 78 (1970), the Sixth Circuit concluded "that no right was violated and therefore that no reversible error occurred despite the departure from authorized jury size." *Hanson,* 872 F.2d at 750.

Petitioner filed a Petition for Rehearing *En Banc.* When no judge of the Sixth Circuit requested a vote for rehearing *en banc,* the petition was denied by Order entered on June 6, 1989.

REASONS FOR DENYING WRIT

Petitioner asks this Court to review an issue that is not presented by the record. The record shows not only that Petitioner failed to object to the eight person jury, but also that he agreed to the eight person venire before the jury was impanelled. There were no alternate jurors in the deliberations, and Fed. R. Civ. P. 47(b) did not come into play.[1] Moreover, even if the record did raise the Rule 47(b) issue advanced by Petitioner, there is no reason for this Court to reconsider the well-established principles regarding the effect of jury size on the right to trial by jury as set forth in *Ballew v. Georgia*, 435 U.S. 223 (1978), *Colgrove v. Battin*, 413 U.S. 149 (1973), and *Williams v. Florida*, 399 U.S. 78 (1970).

The principal reason for denying *certiorari* is that the record squarely contradicts the assertions on which Petitioner bases his argument. There were no alternate jurors, and Petitioner's attorneys did agree to the procedure which produced an eight person jury.[2] Since *no* alternate jurors participated in the jury deliberations, the reported cases cited by Petitioner, including the Fourth Circuit's decision in *Kuykendall v. Southern Rail-*

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1. Petitioner has never identified the so-called "alternate" or "extra" jurors, because *no* alternate jurors were ever designated. The case was decided by eight "regular" jurors, and this Court should not be misled by Petitioner's repeated references to non-existent and unidentifiable "alternate" jurors.

2. The district court's Statement on the Evidence or Proceedings stands unchallenged as the record on appeal regarding the pretrial stipulation on jury selection procedures. Petitioner does not ask this Court to review the procedure by which the district court supplemented the record. Nor does Petitioner challenge the Sixth Circuit's finding that the record was properly supplemented pursuant to Fed. R. App. P. 10.

way Co., 652 F.2d 391 (4th Cir. 1981), are simply inapplicable. Moreover, the circuit courts of appeal that have considered the issue are unanimous in holding that a party cannot claim error with regard to a jury selection procedure discussed with and agreed to by his own trial counsel. *United States v. Viserto*, 596 F.2d 531, 539-40 (2d Cir.), *cert. denied*, 444 U.S. 841 (1979); *Seese v. Volkswagenwerk, A.G.*, 648 F.2d 833, 847-49 (3rd Cir.), *cert. denied*, 454 U.S. 867 (1981); *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 514-15 (4th Cir. 1985); *Latex Supply Co. v. Freuhauf Trailer*, 444 F.2d 1366, 1367 (5th Cir.), *cert. denied*, 404 U.S. 942 (1971); *United States v. Davis*, 608 F.2d 698 (6th Cir. 1979), *cert. denied*, 445 U.S. 918 (1980).

Petitioner's plea to this Court is premised not only on a mischaracterization of the record but also on a mischaracterization of the ruling below by the Sixth Circuit Court of Appeals. The Sixth Circuit did not sanction violations of Rule 47(b); nor did it authorize the presence of alternate jurors in jury deliberations; nor did it apply the harmless error standard to a purported violation of the Seventh Amendment right to a trial by jury.[3] The *only* holding by the Sixth Circuit—which Petitioner conveniently never mentions in his Petition—was that the record supported the district court's finding

3. It should be noted that Petitioner did not even mention the Seventh Amendment in the district court nor in his original arguments to the Sixth Circuit. The first time that Petitioner even suggested that his Seventh Amendment rights might be affected was in his Petition for Rehearing *En Banc* after the Sixth Circuit had already issued its opinion. In any event, this Court has already rejected Petitioner's argument that the Seventh Amendment guarantees a particular number of jurors and the argument that 28 U.S.C. § 2072 supposedly prohibited any deviation from the number of jurors used under the common law. *Colgrove v. Battin*, 413 U.S. 149, 158-63 (1973).

of a Rule 48 stipulation to the jury selection procedures that produced an eight person jury. *Hanson*, 872 F.2d at 748-49. Indeed, Petitioner identifies *no* issue and presents *no* argument that calls into question the *actual* holding of the Sixth Circuit. This Court should not grant *certiorari* to review fictitious rulings on a fictitious record. The actual record from the trial court and the actual ruling by the Sixth Circuit do not warrant review.

Even the *dicta* of the Sixth Circuit—which Petitioner misrepresents as the holding—does not merit the attention of this Court. Petitioner's arguments are directed at the following observation of the Sixth Circuit:

> Moreover, *assuming* that Rule 47(b) and that Local Rule 12(j) may have been violated, we still believe such violations are subject to the application of the harmless error standard of Fed. R. Civ. P. 61. *Cf. United States v. Levesque*, 681 F.2d 75, 80 (1st Cir. 1982) (violation of Fed. R. Crim. P. 24 warrants reversal only where irregularity affects substantial rights).

Hanson, 872 F.2d at 749 (emphasis added). The Sixth Circuit's *dicta* is, of course, consistent with this Court's conclusion that the mere size of a jury does not impinge on any substantial right of a party so long as the jury is "large enough to facilitate group-deliberation combined with a likelihood of obtaining a representative cross section of the community." *Colgrove v. Battin*, 413 U.S. 149, 160 n.16 (1973).

In *Colgrove* the Petitioner challenged a local rule of court that prescribed a jury of six instead of twelve for trial of all civil cases. Relying heavily on its prior

decision in *Williams v. Florida*, 399 U.S. 78 (1970), this Court stated:

> [T]he question comes down to whether jury reliability is a function of jury size. In *Williams* we rejected the notion that "the reliability of the jury as a factfinder . . . [is] a function of its size," and nothing has been suggested to lead us to alter that conclusion.

Colgrove, 413 U.S. at 157 (citation omitted).

Petitioner is actually claiming error on the anomalous ground that he received *more* of a "representative cross section" and *more* of an opportunity to avoid defeat than he deserved under the rules. *One* dissenting juror would have prevented a victory for Respondents, and Petitioner had a higher probability of one dissenting view with a group of eight than with a group of six.[4] *See*, Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. Chi. L. Rev. 710, 717-18.

If this case involved outside influences on the jury's deliberations, or if this case involved unqualified jurors, Petitioner might legitimately claim a violation of substantial rights. Petitioner, however, does not contend that the jury was manipulated or wrongfully influenced in any way. Nor does he claim that *any* two of the eight jurors were incompetent or unqualified. Faced with a unanimous verdict for Respondents, Petitioner simply

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4. Petitioner claims he was prejudiced because he "faced the burden of convincing eight, not six, people." Petition for Writ of Certiorari at 12 n.3. A litigant who cannot convince one juror has little reason to complain about the extra "burden" of convincing eight rather than six.

asserts a baseless preference for six jurors rather than eight. Petitioner never explains why a jury of eight should be *per se* reversible error when juries of six or juries of twelve are conclusively valid.

In fact, given the historical ideal of a twelve person jury, it is hard to find any reasoned basis for Petitioner's adamant insistence on a panel of six instead of eight. As Justice Marshall observed, "All one can say is that a jury of six functions less like a jury of 12 than would a jury of, say eight . . ." *Colgrove*, 413 U.S. at 180-81 (Marshall, J., dissenting). Moreover, the exhaustive empirical studies reviewed by this Court in *Ballew v. Georgia*, 435 U.S. 223, 231-40 (1978), support the conclusions that a jury of eight would, if anything, be more reliable, more representative, and more likely to foster effective deliberation than a jury of six. *See also, Brown v. Louisiana*, 447 U.S. 323, 332 (1980); *Colgrove*, 413 U.S. at 158-60.

In summary, the submission of this case to an eight person jury did not violate or even implicate any substantial rights of Petitioner. To the contrary, Petitioner's claim was unanimously rejected by a more representative and more reliable jury than he was entitled to under the law. Most importantly, however, the record in this case simply does not raise the issue presented by Petitioner. There were no alternate jurors in the jury deliberations, and Petitioner agreed to the procedure that produced the eight person jury. The Sixth Circuit did not authorize deviations from Fed. R. Civ. P. 47(b); it merely enforced the Petitioner's stipulation under Fed. R. Civ. P. 48.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Noel F. Stahl, a member of the Bar of the Supreme Court of the United States and counsel of record for Peter N. Arrowsmith, M.D., Peter N. Arrowsmith, M.D., P.C., and Arrowsmith Eye Institute, Respondents herein, hereby certify that on this 28th day of September, 1989, the requisite number of copies of the foregoing brief were served upon Steven A. Riley, BASS, BERRY & SIMS, 2700 First American Center, Nashville, Tennessee 37238, attorneys for Petitioner, by United States mail, postage prepaid.

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No. 89-383

In the Supreme Court of the United States

OCTOBER TERM, 1989

LARRY RAY HANSON,
Petitioner,
vs.
PETER N. ARROWSMITH, M.D.; PETER N. ARROWSMITH, M.D., P.C.; AND ARROWSMITH EYE INSTITUTE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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(Filed September 9, 1986)

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF TENNESSEE,
NASHVILLE DIVISION

DOCKET NO. 3-84-0655

LARRY RAY HANSON, ET AL.,

vs.

PARKSIDE SURGERY CENTER, ET AL.

ORDER

Pending before the Court is plaintiffs' motion for a new trial. The Court, pursuant to Local Rule of Court 8(b)(1), finds that oral argument on this motion is unnecessary. In their motion, plaintiffs assert a number of grounds for a new trial.

First, plaintiffs assert that the verdict was against the weight of the evidence. However, plaintiffs have not demonstrated that the jury verdict was in any way contrary to the evidence. Accordingly, the motion for a new trial on this ground is hereby DENIED.

Second, plaintiffs have alleged that a new trial is warranted because the Court erred in thirteen respects in its conduct of the trial. Each of these claims is legal in nature, yet plaintiffs have provided to the Court no legal authority as required by Local Rule of Court 8(b)(2) in support thereof. Accordingly, the motion for a new trial on these grounds also is DENIED.

Entered this the 9th day of September, 1986.

/s/ John T. Nixon
United States District Judge